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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 608

MICHAEL KOKIN, GUSTAVE DAVE LANGE and EASTERN FIREARMS COMPANY, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES J. IRWIN
17 Academy Street
Newark, New Jersey 07102
Counsel for Petitioner

Of Counsel:

ARTHUR L. ABRAMS
17 Academy Street
Newark, New Jersey 07102

September 27, 1966.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement	5
Argument	9
1. The Stipulated Facts Clearly Establish That Petitioners Were Innocently Entraped by Federal Agents and Are Therefore Not Guilty of the Crimes as a Matter of Law	9
2. The Decision Below Violates the Principle of Cole v. Arkansas, 333 U.S. 196	12
3. The Courts Below Erred in That: (a) the Facts as Stipulated Fail to Describe Any Criminal Act by Petitioner; (b) Petitioners Were Not Indicted for the Crime Adjudged by the Trial Court; (c) the Manufacture Tax Section of the National Firearms Act § 5821 Was Not Considered; (d) Petitioners Were Convicted of Violating a Taxing Statute Without Intent; (e) Relevant Legislative History Was Not Considered; (f) the Court of Appeals Refused Petitioner's Motion For Extention of Time Within Which to Petition For Rehearing	15
Conclusion	21
Appendix A (Opinion)	1a
Appendix B (Opinion of the Court)	12a
Appendix C (Motion For Extension of Time to File Petition For Re-Hearing With the United States Court of Appeals for the Third Circuit Together With Supporting Affidavits)	13a

CASES CITED

	Page
Cole v. Arkansas, 333 U.S. 196	2, 13, 15
Sorrels v. United States, 287 U.S. 435 (1932)	9, 11
Henderson v. United States, 237 F. 2d, 169	11
Banks v. United States, 249 Fed, 672	11
Newman v. United States, 299 Fed, 128	11
Sherman v. United States, 356 U.S. 369 (1958)	11
Sonzinsky v. United States, 300 U.S. 506 (1937)	18
U.S. v. Tott, 42 F. Supp. 252, affirmed 3 Circuit 131 F. 2d 261	19

STATUTES

National Firearms Act, Title 26, United States Code (1954)	3
§ 5848(1)	3
§ 5848(2)	3, 17
§ 5811 Tax	3, 17, 19
§ 5821 Rate, Exceptions, Etc.	3, 9, 10, 15, 16, 18
§ 5802 Registration	4
§ 5801 Tax	5
§ 5814	17

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey entered on September 28, 1965 is not officially reported but is reprinted in the

Appendix A hereto, p. 1a, *infra*. The opinion of the Court of Appeals for the Third Circuit, entered on July 29, 1966, is reprinted in the Appendix B hereto, p. 12a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1966. On timely application, Mr. Justice White on August 25, 1966, signed an order extending the time for filing this petition for writ of certiorari to and including September 27, 1966. On September 1, 1966 petitioners moved the Court of Appeals for the Third Circuit to extend the time within which a petition for rehearing could be filed with the court. The Motion was denied on September 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where federal agents conceive of, initiate, perpetuate and lure innocent citizens into assisting the agents in the performance of an unlawful act, do such activities constitute "entrapment"?

2. Did the decision below violate the principles of *Cole* v. *Arkansas*, 333 U.S. 196?

3. On conviction for violation of the National Firearms Act, did the Court below err in failing or refusing to consider that: (a) the stipulated facts did not describe a crime; (b) Petitioners were not indicted for the crime adjudged by the trial court; (c) Section 5821 was applicable; (d) Mens rea is a necessary element for conviction for violation of this taxing statute; (e) there is applicable legislative history.

STATUTORY PROVISIONS INVOLVED

National Firearms Act, Title 26, United States Code (1954)

§ 5848(1)

FIREARM.—The term "firearm" means a shotgun or rifle having a barrel of less than 18 inches in length . . . or a machine gun.

§ 5848(2)

MACHINE GUN.—The term "Machine Gun" means any weapon which shoots, or is designed to shoot, automatically or semi-automatically, more than one shot, without manual reloading, by a single function of the trigger.

§ 5811 TAX

(a) RATE.—There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200.00 for each firearm; . . . The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

BY WHOM PAID.—Such tax shall be paid by the Transferor: PROVIDED, That if a firearm is transferred without payment of such tax the transferor and transferee shall become jointly and severally liable for such tax.

§ 5821 RATE, EXCEPTIONS, ETC.

(a) RATE.—There shall be levied, collected and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200.00 for each firearm so made.

(b) EXCEPTION.—The tax imposed by sub-section (a) shall not apply to the making of a firearm, (1) by any

person who is engaged within the United States in the business of manufacturing firearms; (2) from another firearm with respect to which a tax has been paid, prior to such making, under subsection (a) of this section; or (3) for the use of—(A) The United States government, any state, territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or (B) any peace officer or any federal officer designated by regulations of the secretary or his delegate.

Any person who makes a firearm in respect of which the tax imposed by subsection (a) does not apply by reason of the preceding sentence shall make such report in respect thereof as the secretary or his delegate may by regulations prescribe.

§ 5814 ORDER FORMS

(a) GENERAL REQUIREMENTS.—It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the secretary or his delegate. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this chapter: PROVIDED, That, if the applicant is an individual, such identification shall include finger prints and a photograph thereof.

§ 5802 REGISTRATION

IMPORTERS, MANUFACTURERS, AND DEALERS.—On first engaging in business, and thereafter on or before the first day of July of each year, every importer, manufacturer, and dealer in firearms shall register with the Secretary or his delegate in each Internal Revenue District in which such business is to be carried on his

name or style, principal place of business, and places of business in such district.

§ 5801 TAX

(a) RATE.—On first engaging in business, and thereafter on or before the first day of July of each year, every importer, manufacturer, and dealer in firearms shall pay a special tax at the following rates: . . .

(2) DEALERS OTHER THAN PAWNBROKERS. Dealers, other than pawnbrokers, $200.00 a year or fraction thereof;

STATEMENT

On July 1, 1964 petitioners were charged in an eight-count indictment with violations of various sections of the National Firearms Act. The indictment complained of two separate transactions, the "Douglas Transaction" and the "Conover Transaction", which were alleged to be sales of "firearms" within the purview of the Act.

On July 29, 1964 the petitioners each entered a plea of not guilty, and on September 31, 1964 trial by jury was waived in each instance and the petitioners consented to trial by the court without jury, on stipulated facts.

Stipulated facts were filed with the trial court on November 23, 1964, a copy of which stipulation is reprinted as part of the opinion of the District Court in Appendix A, p. 2a-7a, *infra*.

The opinion of the District Court filed September 29, 1965 found each of the petitioners guilty on Counts 2, 4 and 6 of the indictment ("Conover Transaction") and not guilty on all other counts ("Douglas Trans-

action"). On February 8, 1966 each of the petitioners was fined $500.00 on Count 2, and imposition of sentence on Counts 4 and 6 was suspended.

It should be noted that the imposition of the fines does not constitute the real damage suffered by these petitioners. This conviction effectively prohibits petitioners from continuing an interstate firearms business.[1]

In the "Douglas Transaction", G. Edward Douglas, a supervisor of the Alcohol and Tobacco Tax Division of the U.S. Treasury Department, obtained by mail from Eastern Firearms Company a price list from which he ordered and received from Eastern an M-1 carbine (which is not a "firearm' 'as defined by § 5848) and various itemized M-2 carbine parts. Douglas, the federal agent, then disassembled the M-1 carbine and using the M-2 parts, assembled a fully operative M-2 carbine. An M-2 carbine if operative is a "firearm". (Stipulated Facts, paragraphs 10 through 14, Appendix A, p. 4a-5a, *infra.*)

The trial court properly held that the simultaneous sale of the M-1 carbine and the enumerated M-2 parts, even assuming they could be readily employed in the construction of an operative M-2 carbine, did not under the statute constitute the sale of an M-2 "firearm". (Appendix A, p. 7a, *infra*)

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[1] Title 15, § 902 (e) provides:

> "It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

The trial court therefore entered a verdict as to all defendants of not guilty of counts 1, 3, 5, 7 and 8 of the indictment.

In the "Conover Transaction", Norman R. Conover, a criminal investigator for the Alcohol and Tobacco Tax Division of the U.S. Treasury Department, visited the business premises of Eastern Firearms Company on August 5, 1963. At that time he unsuccessfully attempted to purchase an M-1 carbine and all of the parts necessary to convert it to an M-2 carbine (the identical materials purchased by Douglas in the "Douglas Transaction").

On October 17, 1963 Conover returned to Eastern Firearms and again attempted unsuccessfully to purchase an M-1 and the M-2 parts. He then left a deposit with petitioner Kokin and requested that Kokin telephone him when all of the items were available.

On November 2, 1963 Conover received a message that the items were available.

On November 4, 1963 Conover finally succeeded in purchasing from petitioner company an M-1 carbine, the desired M-2 parts, an M-1 stock which petitioner Lange altered to fit M-2 requirements and an Army Field Manual on the M-1, M1-A1, M-2 and M-3 carbines.

On November 4, 1963 Conover used the M-1 carbine and the M-2 parts purchased from Eastern to assemble an M-2 carbine which, however, would not operate.

On November 5, 1964[2] Conover took the M-2 carbine

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[2] The date shown in the stipulated facts is obviously incorrect. The events alleged to have occurred on November 5, 1964 occurred several days after November 4, 1963.

which he had assembled to Eastern, and Lange at Conover's request replaced a bent part, made an alteration on the stock and returned the weapon to Conover. Conover subsequently test fired the M-2 and found it would operate as a fully automatic weapon.

The trial court after finding no intent by petitioners to violate the law found them guilty on each count of the indictment which was based on the "Conover Transaction". The court distinguished the "Conover Transaction" from the "Douglas Transaction" by saying that the interest of petitioners in the M-1 and the M-2 parts did not terminate on the sale date but only upon operational assembly in the presence of petitioners on the subsequent date. (Appendix A, p. 9a, *infra.*)

The only question raised initially on appeal to the Third Circuit was:

> "Did not sale of an M-1 carbine and assorted unassembled M-2 gun parts constitute a completed lawful sales transaction outside the purview of the National Firearms Act?"

The Court of Appeals answered, "No." The Court said, contrary to the holding of the trial court in the "Douglas Transaction," that:

> "The sale and transfer of an M-1 carbine . . . with all the parts necessary to convert it into an M-2 carbine . . . constituted such a transfer of a machine gun as the statute contemplates and regulated." Appendix B, pp. 12a-13a, *infra.*

On August 19, 1966 the undersigned Counsel was retained to file the within petition. A motion for an extension of time within which to file a petition for rehearing was promptly filed with the Court of Appeals. Copies of the moving papers and affidavits are re-

printed in the Appendix C, hereto, p. 13a, *infra*. The attention of the Appellate Court was thereby directed to the following vital issues which had not previously been briefed, argued or apparently considered by either the trial or appellate court: (1) The question of federal entrapment in the "Conover Transaction". (2) The failure of the stipulated facts to support the crimes charged in the indictment. (3) Failure to consider the effect of § 5821 of the National Firearms Act dealing with the manufacture of "firearms". (d) Failure to consult the relevant legislative history of the Act particularly respecting the "part or parts" clause. (e) Conviction on a "taxing statute" notwithstanding a specific finding of lack of intent. The motion was denied by the Court of Appeals on September 20, 1966.

ARGUMENT

1. The Stipulated Facts Clearly Establish That Petitioners Were Innocently Entraped by Federal Agents and Are Therefore Not Guilty of the Crimes Charged as a Matter of Law

The defense of entrapment was raised by the not guilty plea of each petitioner. *Sorrels* v. *United States*, 287 U.S. 435, (1932).

According to the stipulated facts,

(1) Norman R. Conover, a criminal investigator for the Alcohol and Tobacco Tax Division of the Treasury Department, visited Eastern Firearms Company on August 5, 1963, at which time he attempted to purchase an M-1 carbine and the parts necessary to convert same into an M-2 carbine. He was advised that they were not in stock.

(2) On October 17, 1963, Conover again visited Eastern Firearms Company, seeking the M-1 carbine and M-2 parts. At that time he left a

deposit for the purchase and requested that he be telephoned when his order was complete. On November 4, 1963 Conover revisited Eastern Firearms Company and purchased the M-1 carbine and the M-2 parts.

(3) On the same day federal agent Conover manufactured a machine gun from the M-1 carbine and M-2 parts, but he was unable to make it operate.

(4) On November 5, 1964, Conover returned to Eastern Firearms Company and obtained the assistance of the individual Petitioners in putting the M-2 carbine which he had manufactured in functioning order.

The District Court made no finding of actual intent by the petitioners to violate the provisions of the National Firearms Act, saying, "such intent is neither manifest in the stipulation or implicit in the single isolated violation at Bar." The petitioners were not in the business of selling machine guns, they were not licensed to sell machine guns, and the court found that they did not intend to transfer a machine gun.

Agent Conover made a legal purchase of an M-1 carbine together with M-2 parts. The purchase was made only after three trips to petitioners place of business by the Federal agent. He, the Treasury Agent, then used the M-1 carbine and M-2 parts to manufacture a machine gun in violation of § 5821 of the National Firearms Act, which provides:

> "There shall be levied, collected and paid upon the making in the United States of any firearm (whether by manufacture, *putting together,* alteration, any combination thereof, or otherwise) a tax at the rate of $200.00 for each firearm so made." (emphasis added)

Agent Conover put the parts together. He made the firearm on November 4, 1963. *A fortiori* it did not exist and could not have been transferred to him earlier that day by petitioners.

Agent Conover subsequently returned to petitioners with the M-2 which he had made from the parts he had purchased and elicited their aid as gunsmiths to put it in operating condition by changing a bent part (a part which could have been deliberately bent by an agent to further enmesh the petitioners).

On the above facts petitioners were convicted of transferring a machine gun in violation of the National Firearms Act.

The crime charged was conceived of by Federal agents. The parts necessary to completion of the criminal act were obtained only by persistent efforts by the Federal agents. The criminal act, manufacture of a machine gun, was accomplished by Federal agents, and the court found that the petitioners never intended to violate the National Firearms Act.

No clearer case of entrapment can be imagined. "The government cannot be permitted to contend that petitioners are guilty of a crime where the government officials are the instigators of their conduct." *Sorrells* v. *United States,* supra. See also *Henderson* v. *United States,* 237 F. 2d, 169, *Banks* v. *United States,* 249 Fed. 672, *Newman* v. *United States,* 299 Fed, 128.

Entrapment occurs when the criminal conduct is the creative activity of law enforcement officials. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. *Sherman* v. *United States,* 356 U.S. 369 (1958).

> "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it." *Butts* v. *United States*, 273 Fed. 35.

The first and chief endeavor of Federal Agent Conover was to create a crime by petitioners in order to punish it. It is unconscionable and contrary to public policy, and to the established law of the land to punish petitioners for the commission of an offense of the like of which they had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured them into innocent commission.

This issue was not argued before the District Court or Court of Appeals, and neither court considered it in its opinion. The attention of the Court of Appeals to this clear issue was elicited, however, in petitioners motion to extend the time within which a petition for rehearing could be filed. (Appendix C, *supra*). The Court denied the motion thereby precluding the detailed investigation of authorities demanded by the stipulated facts.

So clear is the existence of Federal entrapment on the face of the stipulated facts as to warrant the exercise of this Court's jurisdiction and outright reversal of the judgments of conviction.

2. The Decision Below Violates the Principle of Cole v. Arkansas, 333 U.S. 196

Petitioners clearly were entitled, as a matter of due process, to have the validity of their convictions appraised by the Court of Appeals, "on consideration of the case as it was tried and as issues were determined

in the trial court." *Cole* v. *Arkansas*, 333 U.S. 196, 202. But that principle was egregiously violated by the court below.

The trial court found petitioners guilty of transfering a fully operable M-2 carbine, which is a "firearm". Said transfer was made, according to the court's interpretation of the stipulation of facts, on November 5, 1964. The Court of Appeals ostensibly affirmed the verdict of the trial court but found that petitioners were guilty of selling an M-1 carbine and the parts necessary to convert it to an M-2 carbine, which event occurred according to the stipulation of facts, on November 3, 1963. The items transferred as found by the trial court and the Court of Appeals are different, the dates of transfer are different and the crimes are different.

The affirmance below was premised on an offense described as follows:

> "On the merits, the principal question presented by this appeal is *whether,* in the circumstances of this case, *the sale and transfer of an M-1 Carbine, itself not a machine gun together with all the parts necessary to convert it into an M-2 Carbine, a type of machine gun, constituted such a transfer of a machine gun,* as the statute contemplates and regulates . . . we are satisfied that . . . the appellants have violated the law." (Emphasis added) Appendix B, p. 12a, *infra.*

But appellants were not convicted by the trial court on the theory that transfer of an M-1 together with the parts necessary to convert it into an M-2 constituted a transfer of a machine gun, for the trial court specifically held that such a transfer is not, "proscribed by the letter of the Act."

The trial court in finding petitioners not guilty of counts 3, 5 and 7 of the indictment ("Douglas Transaction") said:

> "We examine first the Agent Douglas transaction. There it is apparent that the violation—if committed at all—must have resulted from the simultaneous mailing of the M-1 carbine and M-1 stock plus the enumerated M-2 carbine parts. *Assuming that these various elements could be readily employed in the construction of an operative M-2 carbine rifle, the court cannot find the presence of such a weapon in the sale itself.*" (Emphasis added).

Defendants-Appellants were found guilty by the trial court on counts 2, 4 and 6 ("Conover Transaction") based upon a finding that:

> "The facts demonstrate an unbroken commercial interest on the part of defendant vendors for some three months in overseeing the actual realization of that weapon. This interest was in no way severed or satisfied on a mere transfer of the basic unfitted components to Conover (the Federal agent). Rather, it is clear, *the interest terminated only upon operational assembly by and in the presence of defendants.* Only at this point did Conover obtain what he had bargained for—an M-2 carbine automatic rifle." (Emphasis added).

According to the stipulated facts, Agent Conover purchased the M-1 and M-2 carbine parts from defendants-appellants on November 4, 1963. The Third Circuit Court of Appeals affirmed the conviction of the District Court on the ground that said sale constituted a crime. The District Court however, found no such crime. Petitioners were convicted by the trial court for

the events which occurred according to the stipulated facts on November 5, 1964 at which time petitioners assisted Agent Conover in putting the weapon, which he (Conover) had previously assembled, in functioning order.

The Third Circuit Court of Appeals has ostensibly affirmed conviction for a criminal act on November 4, 1963. The trial court on the other hand found petitioners guilty of a crime which occurred on November 5, 1964 (sic). Each court applying a different interpretation of the elements of the offense.

Petitioners were thereby deprived of their rights to have their conviction reviewed on the same basis of the theory of conviction by the trial court and the failure of the Circuit Court of Appeals so to do is so grossly violative of the principles of *Cole* v. *Arkansas* supra as to call for reversal.

3. The Courts Below Erred in That: (a) the Facts as Stipulated Fail To Describe Any Criminal Act by Petitioner; (b) Petitioners Were Not Indicted for the Crime Adjudged by the Trial Court; (c) the Manufacture Tax Section of the National Firearms Act § 5821 Was Not Considered; (d) Petitioners Were Convicted of Violating a Taxing Statute Without Intent; (e) Relevant Legislative History Was Not Considered; (f) the Court of Appeals Refused Petitioner's Motion for Extension of Time Within Which To Petition for Rehearing

(a) The facts as stipulated fail to describe any criminal act by petitioners.

Paragraphs 7 and 8 of the stipulated facts state:

> "7. On November 4, 1963, in the presence of Investigator Carl Windsor, Alcohol & Tobacco Tax Division, Newark, New Jersey, Conover assembled an M-2 carbine using the M-1 carbine and the M-2

parts which he had purchased from Eastern Firearms, using the Field Manual as a guide. When assembled, the weapon would not function properly because of a bent and worn disconnector lever assembly.

8. On November 5, 1964, Conover returned to Eastern Firearms with a completely assembled M-2 carbine, separated from the stock. Defendant Lange who was in the store, examined the M-2 carbine, determined that the disconnector lever assembly was faulty, and replaced the assembly with a new one. Defendant Lange handed the M-2 carbine back to Conover, and Conover attempted to fit it into the M-1 carbine stock. He could not accomplish this and defendant Lange altered the stock, assembled the weapon into the stock, checked the functioning, and returned the weapon to Conover. Conover then purchased a box containing 50 rounds of U.S. Government 30-caliber carbine ammunition from defendant Lange. Conover separated the M-2 carbine action from the stock and then left the store with the weapon."

Unless Agent Conover paid a tax of $200.00 on November 4, 1963 or on November 5, 1964, the above facts would appear to support an indictment against him for manufacture of a firearm without payment of tax contrary to § 5821, Title 26, U.S.C. which states:

"There shall be levied, collected and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200.00 for each firearm so made."

Perhaps petitioners were guilty on November 5, 1964 (sic) of aiding Conover in manufacturing a "firearm", but they have not been indicted for that. If as the trial court concluded the firearm was not manu-

factured until November 5, 1964 (sic), at which time the parts were owned by Conover, the "firearm" obviously had no independent existence prior to that date, and the petitioners could not have transferred it on November 4, 1964 as alleged in the indictment.

If as the trial court states simultaneous sale of an M-1 and of M-2 parts does not constitute sale of a "firearm" then no criminal activity can be found in the stipulation of facts except that which relates to Conover's apparent illegal manufacture of the M-2 carbine.

(b) Petitioners were not indicted for the crime adjudged by the trial court.

Count 2 of the Indictment charges that on November 4, 1963 the defendants "did knowingly and unlawfully transfer a firearm as defined in 26 U.S.C. 5848(2), in violation of 26 U.S.C. 5811(a)."

Count 4 charges transfer of a firearm on November 4, 1963 in violation of 26 U.S.C. 5814, and count 6 charges unlawfully dealing in firearms on November 4, 1963, without registration, as required by 27 U.S.C. 5802.

The Trial Court, whose opinion was affirmed by the Court of Appeals, after declaring that a mere sale of an M-1 carbine and the M-2 parts necessary to convert it to an M-2 is not the sale of a firearm under the National Firearms Act, found that with respect to the Conover transaction, the interest of the defendants-appellants "terminated only upon operational assembly by and in the presence of the defendants. Only at that point did Conover obtain what he had bargained for." The interest terminated, therefore, and the sale took place,

according to the Court, on November 5, 1964 for, according to the Stipulated Facts, the weapon was not made operational until that date—after the parts were sold on November 4, 1963. The Courts decision, therefore, cannot be reconciled with the indictment alleging commission of the crimes on November 4, 1963, which is the date the parts were sold. The defendants cannot be found guilty of a crime for which no opportunity for defense has been afforded, and no indictment filed.

(c) The Manufacture Tax Section of the National Firearms Act § 5821(a) was not considered.

Section 5821 of the National Firearms Act provides that:

> "there shall be levied, collected and paid upon the making in the United States of any firearm (either by manufacture, putting together, alteration, any combination thereof, or otherwise), a tax at the rate of $200.00 for each firearm so made."

The National Firearms Act is a taxing statute, *Sonzinsky* v. *United States,* 300 U.S. 506 (1937), and is collaterally designed to establish a Federal register of certain kinds of weapons which are defined to be "firearms". The petitioners were indicted, tried and convicted for transferring a firearm without having paid a tax of $200.00 in accordance with 28 U.S.C. 5811(a). If, rather than transferring an operable machine gun, parts for such a weapon are transferred, no tax is due until those parts are assembled into an operable weapon, at which time the Government has an interest in being notified of the existence of the new "firearm" and the tax is due and payable by the person who made the firearm "either by manufacture, putting together, alteration, any combination thereof, or otherwise." The Stipulated Facts in the captioned matter

make it clear that the firearm first came into being in Conover's hands and he had a duty to file the requisite forms and pay the required tax for manufacture on November 4, 1963, when he first attempted to manufacture a machine gun from the material purchased from the petitioners, or at the latest on November 5, 1964, when he finally succeeded in his efforts, with the assistance of the petitioners. The individual petitioners may be guilty of assisting him to violate the National Firearms Act in manufacturing the machine gun, but they cannot, as the law is written, be guilty of selling a firearm on November 4, 1963. The "firearm" was manufactured subsequent to that date.

(d) Petitioners were convicted of violating a taxing statute without intent to commit a crime.

Each and every count of the Indictment alleges that the acts complained of were knowingly and unlawfully perpetrated. The Opinion of the Trial Court says as a fact that the defendants had no criminal intent. The cases cited in the decision of the trial court relating to intent turn on other sections of the National Firearms Act. The conviction in the instant case turns on innocent failure to pay a tax. The element of intent should be reconsidered in that light.

(d) Relevant legislative history was not considered.

From the history of the National Firearms Act it is readily apparent that its coverage was intended to differ from the Federal Firearms Act, which deals with pistols, etc. One of the differences is the inclusion in the Federal Firearms Act of an "any part or parts" clause. This construction is buttressed by *U.S.* v. *Tott*, 42 F. Supp. 252, affirmed 3 Circuit 131 F. 2d 261, a case

involving the construction of the Federal Firearms Act. The Court there noted that the "earlier National Firearms Act (of 1934) lawfully in *pari materia* was under discussion during the enactment process of the 1938 (Federal Firearms) Act." The 1938 Act originally, like the 1934 Act, contained no "part or parts clause". These words were added to the Federal Firearms Act later by specific amendment. No such amendment was added to the 1934 Act. Evaluation of this legislative history is essential to proper disposition of the instant case.

(f) The Court of Appeals refused petitioners' motion for extension of time within which to petition for rehearing. All of the above stated questions were raised in the petitioners' motion to the Court of Appeals for the Third Circuit to extend the time within which to file a petition for rehearing. Counsel was changed between the time of the argument before the Third Circuit and the filing of this petition, and as was pointed out to the court below at the time present counsel was retained, the time for filing a petition for rehearing had already expired and none of the vital questions discussed above had been considered by the court. It was within the court's discretion to extend the time to file a petition for rehearing and to afford the petitioners an opportunity to have these questions considered. The court below abused this discretion in failing to grant the additional time; and the case should be remanded with additional instructions to consider all of the legal issues raised herein which had been raised by the aforesaid motion.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES J. IRWIN
17 Academy Street
Newark, New Jersey 07102
Counsel for Petitioner

Of Counsel:

ARTHUR L. ABRAMS
17 Academy Street
Newark, New Jersey 07102

September 27, 1966.

APPENDIX A

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(Filed September 28, 1965)

Criminal No. 15,704

UNITED STATES OF AMERICA

v.

MICHAEL KOKIN, GUSTAVE DAVE LANGE and EASTERN FIREARMS COMPANY

Opinion

LANE, District Judge:

This matter comes before the court upon an eight-count indictment charging defendants with conspiracy, unlawful dealing in, and unlawful transfer of firearms without paying certain taxes or filing the necessary information and registration forms as required by federal law.* The alleged

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* In general:

Count I of the indictment charges conspiracy (a) to knowingly and unlawfully transfer firearms within the meaning of 26 U.S.C. § 5848(2) without first paying the transfer tax as required by 26 U.S.C. § 5811(a); (b) to knowingly and unlawfully transfer such firearms without having first filed certain order forms with the Secretary of the Treasury or his delegate as required by 26 U.S.C. § 5814; (c) to knowingly and unlawfully deal in such firearms without having first registered with the Secretary as required by 26 U.S.C. § 5802 and without having first paid a special occupational tax as required by 26 U.S.C. 5801(a)(2), thereby violating 26 U.S.C. § 5854, and (d) to knowingly and unlawfully transact such firearms in interstate commerce without having first complied with the provision of 26 U.S.C. § 5814 in violation of 26 U.S.C. § 5855.

Counts II and III charge specific knowing and unlawful fail-

violations encompass various provisions of Chapter 53 of Title 26, U.S.C.—The National Firearm Act of 1934.

The facts from which these several allegations arise have been stipulated by the United States Attorney and counsel for defendants. They read as follows:

"1. That during the period from on or about August 5, 1963, to on or about January 10, 1964, the period named in the indictment herein, the defendants, Michael Kokin, Gustave Dave Lange and the Eastern Firearms Company, a corporation of the State of New Jersey, did generally deal in and sell M-1 carbines and M-2 carbine parts to convert M-1 carbines to M-2 carbines at 34-36 Lee Avenue, New Brunswick, Middlesex County, New Jersey.

"2. Michael Kokin and Gustave Dave Lange are officers of said corporation.

"3. An M-2 carbine is a "machine gun" within the provisions of 26 U.S.C. 5848(2).

"4. On August 5, 1963, Norman R. Conover, Criminal Investigator, Alcohol and Tobacco Tax Division, Newark, New Jersey, visited the Eastern Firearms Company at 34-36 Lee Avenue, New Brunswick, New Jersey, in an undercover capacity. On that date, he spoke to defendant Lange and attempted to purchase an M-1 carbine and all

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ures to comply with the transfer tax provision of 26 U.S.C. § 5811(a).

Counts IV and V charge specific knowing and unlawful failure to comply with the order form provisions of 26 U.S.C. § 5814.

Counts VI and VII charge specific violations of 26 U.S.C. § 5854 for knowing and unlawful failure to meet the registration and occupational tax provisions of 26 U.S.C. §§ 5802 and 5801 (a)(2).

Count VIII charges specific knowing and unlawful failure to comply with the order provisions of 26 U.S.C. § 5818 in violation of 26 U.S.C. § 5855 concerning such illegal transacting of firearms in interstate commerce.

parts necessary to convert the M-1 carbine to an M-2 carbine. On that date, defendant Lange advised Conover that he did not have all of the requested M-2 parts available but that he would have all the parts in about two weeks.

"5. On October 17, 1963, Conover revisited the Eastern Firearms Company in an attempt to purchase an M-1 carbine and a complete set of M-2 carbine parts. The salesman at this time was defendant Kokin. Defendant Kokin stated that he had available all the M-2 carbine parts which Conover ordered, but that he did not have any M-1 carbines. Conover left a deposit and requested that he be given a telephone call when both the M-1 carbine and all the requested M-2 parts and the M-1 carbine were available. On November 2, 1963, Conover received a message from Eastern Firearms Co., Inc. that the M-1 carbine and the M-2 parts had arrived.

"6. On November 4, 1963, Conover revisited Eastern Firearms Co., Inc. and was shown a U. S. Government M-1 carbine, serial number 1443970, Government's Exhibit No. G-4, and a complete set of M-2 carbine parts, Government's Exhibit No. G-5. At this time both defendants Kokin and Lange were present. Defendant Kokin stated that he did not have any M-2 carbine stocks but that the M-1 stock could be easily altered to fit the M-2. Kokin attempted to make an alteration on the M-1 stock with a knife. Defendant Lange took over the job and completed it, using a small power grinder. Defendant Lange then re-assembled the M-1 carbine and gave it to Conover. Conover asked for and received from Defendant Kokin a Department of the Army Field Manual on the M-2 carbine, which Kokin asked Conover to return when he had finished with it. Conover paid Kokin $95, $70 for the M-1 carbine and $30 for the M-2 parts, less the deposit of $5, and left the store with the M-1 carbine, a complete set of M-2 carbine parts, and an Army Field Manual on the M-1, M1A1, M-2 and M-3 carbines. Conover received a receipt which is Defendants' Exhibit No. D-2.

"7. On November 4, 1963, in the presence of Investigator Carl Windsor, Alcohol & Tobacco Tax Division, Newark, New Jersey, Conover assembled an M-2 carbine using the M-1 carbine and the M-2 parts which he had purchased from Eastern Firearms, using the Field Manual as a guide. When assembled, the weapon would not function properly because of a bent and worn disconnector lever assembly.

"8. On November 5, 1964, (sic) Conover returned to Eastern Firearms with a complete assembled M-2 carbine, separated from the stock. Defendant Lange who was in the store, examined the M-2 carbine, determined that the disconnector lever assembly was faulty, and replaced the assembly with a new one. Defendant Lange handed the M-2 carbine back to Conover, and Conover attempted to fit it into the M-1 carbine stock. He could not accomplish this and defendant Lange altered the stock, assembled the weapon into the stock, checked the functioning, and returned the weapon to Conover. Conover then purchased a box containing 50 rounds of U. S. Government 30-caliber carbine ammunition from defendant Lange. Conover separated the M-2 carbine action from the stock and then left the store with the weapon.

"9. On November 8, 1963, Conover assembled the M-2 carbine by placing the M-2 parts, in the same condition that it was upon leaving the store on November 5, into the stock, and test-fired the weapon. Present at the test-firing was Investigator Windsor. Conover fired the weapon in full automatic setting. He fired 15 rounds fully automatically with one pull of the trigger.

"10. On November 27, 1963, G. Edward Douglas, Area Supervisor, Alcohol & Tobacco Tax Division, Trenton, New Jersey, wrote to defendant Eastern Firearms Company the letter marked Defendants' Exhibit D-1. In response thereto, Douglas on December 6, 1963, received a detailed price list from Eastern Firearms Company which is marked Government's Exhibit No. G-7.

"11. On December 11, 1963, Douglas wrote another letter, Government's Exhibit No. G-6, to Eastern Firearms in which he ordered an M-1 carbine and an M-1 stock and itemized M-2 parts as set forth in the letter. Douglas also included his personal check in the sum of $115.30, Government's Exhibit No. G-8, to cover the cost of his order.

"12. On January 10, 1964, Douglas received from Eastern Firearms Company by United States mail a box containing an M-1 carbine, Government's Exhibit No. G-1, and M-2 carbine stock, Government's Exhibit No. G-2, and a box containing the M-2 parts, Government's Exhibit No. G-3. These items were received by Douglas at 51 West Cherry Road, Quakertown, Pennsylvania, having been mailed at New Brunswick, New Jersey.

"13. On January 20, 1964, in the presence of supervisor in Charge Paul A. Hankins and Assistant Supervisor in Charge Alfred L. Kubach, Alcohol & Tobacco Tax Division, Douglas disassembled the M-1 carbine and, using the M-2 parts, assembled a fully operative M-2 carbine, and placed it into the M-2 carbine stock.

"14. On January 27, 1964, Douglas fired the converted M-2 carbine in fully automatic position by a single depression of the trigger in the presence of Trooper John Lintott of the New Jersey State Police.

"15. On or about November 4, 1963, defendants Kokin, Lange and Eastern Firearms did complete the transfer aforesaid to Norman R. Conover without the payment of a transfer tax in the sum of $200 as required by Title 25, United States Code, Section 5811(a), and Section 5811(b).

"16. On or about January 10, 1964, defendants Kokin, Lange and Eastern Firearms did complete the transfer aforesaid to G. Edward Douglas without the payment of a transfer tax in the sum of $200 as required by Title 26, United States Code, Section 5811(a) and Section 5811(b).

"17. On or about November 4, 1963, defendants Kokin, Lange and Eastern Firearms did complete the transfer aforesaid to Norman R. Conover without procuring and forwarding to the Secretary of the Treasury or his delegate the order form required by Title 26, United States Code, Section 5814.

"18. On or about January 10, 1964, defendants Kokin, Lange and Eastern Firearms did complete the transfer aforesaid to G. Edward Douglas without procuring and forwarding to the Secretary of the Treasury or his delegate the order form required by Title 26, United States Code, Section 5814.

"19. On or about November 4, 1963, defendants Kokin, Lange and Eastern Firearms did complete the transfer aforesaid to Norman R. Conover without having registered pursuant to Title 26, United States Code, Section 5802, and without paying the tax imposed by Title 26, United States Code, Section 5801(a)(2).

"20. On or about January 10, 1964, defendants Kokin, Lange and Eastern Firearms did complete the transfer aforesaid to G. Edward Douglas without having registered pursuant to Title 26, United States Code, Section 5802, and without paying the tax imposed by Title 26, United States Code, Section 5801(a)(2).

"21. On or about January 10, 1964, the defendants, Kokin, Lange and Eastern Firearms did complete the transfer in interstate commerce aforesaid to G. Edward Douglas without having possession of a stamp affixed as required by Title 26, United States Code, Section 5814.

"22. At the time when the M-1 carbine and the M-2 parts were delivered to Conover and to Douglas, the M-1 carbine would not fire automatically and was not a machine gun within the provisions of 26 U.S.C. 5848(2).

"23. An M-2 carbine stock can be used on an M-1 carbine.

"24. The defendants hold themselves out to be gunsmiths but are not licensed as such by any state or federal agency.

"25. Defendants are dully licensed firearms dealers, but are not licensed to deal in machine guns as defined within the provisions of 26 U.S.C. 5848(2)."

It is defendants' contention that neither of the stipulated transactions constitutes a restricted sale under the applicable statute. They argue that at no time could their activities be construed as entailing an actual transfer of an M-2 carbine automatic rifle.

We examine first the Agent Douglas transaction. There is apparent that the violation—if committed at all—must have resulted from the simultaneous mailing of the M-1 caribne and M-1 stock plus the enumerated M-2 carbine parts. Assuming that these various elements could be readily employed in the construction of an operative M-2 carbine rifle, the court cannot find the presence of such a weapon in the sale itself.

Previous court interpretation has denied statutory application to the transfer of anything less than all of the components necessary to the operation of a given firearm. Thus, in *United States* v. *Thompson,* 202 F. Supp. 503 (N.D. Cal. 1962) the sale of a shotgun minus its firing pin was not held within the purview of the firearms definition. Similarly, the advertising and sale of the several components of two separate weapons on an individual basis should not be violative of a law governing only the transfer of an entire weapon.

This is not to say that such transactions may not defeat the spirit of the firearms legislation. The particular activity, however, is not proscribed by the letter of that act. Moreover, there is nothing on the facts of the Douglas sale to indicate the precise purpose for which the requested parts were to be used. Certainly, the possibility that the

purchased components could be employed to build an M-2 carbine cannot preclude legitimate alternative uses of the parts. Perhaps, in the dealer's eyes, Douglas wished to reconstruct a validly purchased M-2. It is conceivable also that a complete inventory of spare parts was desired for a legally owned set of both carbines.

If the transaction here discussed be deemed dangerous or otherwise within the regulatory intent of the National Firearms Act, the proper remedy rests in legislative amendment. This court cannot on these facts conclude that Douglas sale to be a transfer of an M-2 carbine rifle. To do so would violate the most basic concepts of criminal due process. See *United States* v. *Thompson, supra,* at 507.

In the Agent Conover sale, however, the court finds present different circumstances. We note that Conover, on initial personal confrontation with defendant Lange, requested an M-1 carbine and all parts necessary to convert the M-1 carbine to an M-2 carbine. Thus, it is apparent that defendants, from the very beginning of their dealings with Conover, knew the ultimate purpose of the purchase.

The facts show a continuous effort on the part of defendants to assist and accommodate Conover to attaining this end. In addition to securing all of the necessary conversion components, defendants collaborated in engineering the M-1 stock alteration and further supplied Conover with an Army Field Manual for assembly. Later, by replacing the defective disconnector lever and realtering the stock, defendant Lange was instrumental in making the automatic weapon functional for the first time.

In essence, then Kokin and Lange were presented with a sales proposition consisting of the purchase of an unassembled M-2 carbine rifle. The facts demonstrate an unbroken commercial interest on the part of defendant vendors for some three months in overseeing the actual

realization of that weapon. This interest was in no way severed or satisfied on mere transfer of the basic unfitted components to Conover. Rather, it is clear, the interest terminated only upon operational assembly by and in the presence of defendants. Only at this point did Conover obtain what he had bargained for—an M-2 carbine automatic rifle.

It is, of course, "hornbook law" that criminal statutes are to be conservatively interpreted against the prosecuting authority. *United States* v. *Thompson, supra,* at 507. "But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett,* 348 U.S. 503, 510 (1955). Nor is there any "canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it." *Kordel* v. *United States,* 335 U.S. 345, 349 (1948).

The latter rationale is pertinent and controlling regarding the Conover transaction. In the considered judgment of this court, a sale of all components necessary to the assembly of an automatic weapon, when the dealers have been apprised of the unlawful design of such purchase, is within reasonable interpretation of the firearms legislation. Statutory transfer is even more solidly constituted, assuming this general rule, where, as at bar, defendant dealers actively assist in the weapon construction.

The court makes no finding of actual intent to violate the provisions of the statute here in question. Such intent is neither manifest in the stipulation, nor implicit in the single isolated violation at bar. Intent to violate, however, is not a necessary element in a large generic catalogue of federal crimes. *Morissette* v. *United States,* 342 U.S. 246, 252-56 (1952); *Holdridge* v. *United States,* 282 F. 2d 302, 308-10 (1960). Applicable law amply demon-

strates the National Firearms Act to be *malum prohibitum* legislation. *Scienter* or intent is not referred to in the language of the Act, nor have the decisions found it requisite to criminal liability. *Sipes* v. *United States*, 321 F. 2d 174 (8th Cir. 1963); *United States* v. *Decker*, 292 F. 2d 89 (6th Cir. 1961); *United States* v. *Wost*, 148 F. Supp. 202 (N.D. Ohio E.D. 1957).

Unlike liability for the commission of substantive statutory offenses, "the charge of conspiracy to violate a criminal law has implicit in it elements of knowledge and intent." *Schnautz* v. *United States*, 263 F. 2d 525, 529 (5th Cir. 1929), *cert. denied* 360 U.S. 910 (1959). It is further fundamental that a conspiracy conviction under the federal conspiracy statute* cannot be maintained without "proof of an agreement to commit an offense against the United States." *Pereria* v. *United States*, 347 U.S. 1, 12 (1953). See also *Ingram* v. *United States*, 360 U.S. 672 (1959), and generally, *Perkins on Criminal Law*, pp. 545-47 (1957). Being unable to marshal any record proofs demonstrative of either an intent to violate, or knowledge sufficient upon which to ground an agreement to violate the firearms statute, all charges of conspiracy must be dismissed.

In summary, the court concludes that on the facts of the entire transaction between Agent Conover and defend- § 5848* was consummated. Accordingly, the defendants

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* 18 U.S.C. 371.

* Under the act, "To transfer or transferred" include: " . . . to sell, assign, pledge, lease, loan, give away, or otherwise dispose of." 26 U.S.C. § 5848(10).

The term "dealer" means "any person not a manufacturer or importer, engaged within the United States in the business of selling firearms." It expressly includes "wholesalers, pawnbrokers, and dealers in used firearms." 26 U.S.C. § 5848(8).

are found guilty of the offenses charged in the following counts: Count 11, for failure to pay the transfer tax in violation of 26 U.S.C. § 5811; Count IV, for failure to comply with certain order form requirements in violation of 26 U.S.C. § 5814; and Count VI, for failure to register with the Secretary of Treasury pursuant to 26 U.S.C. § 5802 and failure to pay a special occupational tax pursuant to 26 U.S.C. § 5801(a)(2) in violation of 26 U.S.C. § 2854. As to the remaining counts the defendants stand acquitted.

Dated: September 28, 1965

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15704

UNITED STATES OF AMERICA

v.

MICHAEL KOKIN, GUSTAVE DAVE LANGE AND EASTERN FIREARMS COMPANY, *Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 24, 1966

Before: HASTIE and GANEY, *Circuit Judges;* and WRIGHT, *District Judge.*

Opinion of the Court

(Filed July 29, 1966)

PER CURIAM:

The appellants, dealers in firearms, have been convicted of dealing in and transferring machine guns, as defined in 26 U.S.C. § 5848(2), without such registration and payment of taxes as the law requires. See 26 U.S.C. §§ 5811, 5814, 5801(a)(2), 5802. The case presents a threshold question of jurisdiction because notice of appeal was filed after conviction but before sentences were imposed and judgment entered. However, we are now satisfied that the prematurity of the notice of appeal need not prevent us from considering and deciding these appeals on their merits. *Cf. Lemke* v. *United States,* 1953, 346 U.S. 325; 8 MOORE FEDERAL PRACTICE, 2d ed. 1965, § 37.05[2].

On the merits, the principal question presented by this appeal is whether, in the circumstances of this case, the sale and transfer of an M-1 carbine, itself not a machine

gun, together with all the parts necessary to convert it into an M-2 carbine, a type of machine gun, constituted such a transfer of a machine gun as the statute contemplates and regulates.

In the circumstances elaborated in the opinion of the district court and for the reasons there stated we are satisfied that, to the extent found by the district court, the appellants have violated the law and subjected themselves to the fines imposed.

The judgment will be affirmed.

A True Copy:

Teste:

APPENDIX C

Motion for Extension of Time To File Petition for Re-Hearing With the United States Court of Appeals for the Third Circuit Together With Supporting Affidavits

(Filed September 1, 1966, denied September 20, 1966)

Criminal No. 15,704

UNITED STATES OF AMERICA

v.

MICHAEL KOKIN, GUSTAVE DAVE LANGE and EASTERN FIREARMS COMPANY

Defendants-Appellants respectfully submit this their motion for and move the Court to enter an Order extending the time within which they may file a Petition for Rehearing, as permitted by Rule 33 of the Rules of this Court.

On July 29, 1966, judgment was entered by this Court against Defendants-Appellants affirming the decision of the United States District Court, District of New Jersey. The undersigned attorney for the Defendants-Appellants

was admitted to the Bar of this Court on the hearing day of the captioned case and had no previous Federal Appellant experience. Consequently, counsel was unaware of his right to petition for rehearing and did not advise Defendant-Appellants of such right.

New counsel, with wide criminal trial and appellant experience and with particular experience in the area of firearms litigation and legislation has recently been retained for the purpose of filing a Petition and Writ of Certiorari with the Supreme Court of the United States. Said counsel has advised Defendants-Appellants and the undersigned of the right to petition for rehearing and of several grounds upon which such Petition should be based.

Failure of the Court to permit the filing of a Petition for Rehearing, in view of the above circumstances, and in view of the grounds for such Petition for Rehearing, as more fully set forth in the affidavits attached hereto as Exhibits A and B, will result in a substantial injustice to the Defendants-Appellants.

WHEREFORE, Defendants-Appellants move the Court for an Order extending the time within which they may file a Petition for Rehearing for a reasonable period beyond the time of the granting of such Order.

/s/ EUGENE F. HAYDEN
Eugene Hayden
Attorney for
Defendants-Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 268-64

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

MICHAEL KOKIN, GUSTAVE DAVID LANGE, AND EASTERN FIREARMS COMPANY, *Defendants-Appellants*

Affidavit

STATE OF NEW JERSEY
COUNTY OF ESSEX } ss:

EUGENE HAYDEN, of full age being duly sworn on his oath deposes and says:

1. I am the attorney for Michael Kokin, Gustave David Lange and Eastern Firearms Company, the Defendants-Appellants in the above captioned matter and represented them before the United States District Court, District of New Jersey, in defense of an eight count Indictment charging violation of various sections of the National Firearms Act.

2. On May 24, 1966 I was admitted to the Bar of the Third Circuit Court of Appeals and argued the captioned matter on appeal.

3. On July 29, 1966 the Opinion of the United States Court of Appeals for the Third Circuit was filed, affirming the judgment below.

4. On August 19, 1966, on the instructions of my clients, I retained Charles J. Irwin, Esq., of 17 Academy Street, Newark, New Jersey, for the purpose of filing a Petition for Writ of Certiorari in the Supreme Court of the United States. Mr. Irwin has, over the past five years, handled complex criminal matters involving allged violations of the National Firearms Act.

5. On August 24, 1966, after reviewing the briefs, opinions and documents relating to the captioned matter, Mr. Irwin advised that various legal issues which were vital to the proper evaluation of the case had not been raised on trial or appeal and should be included in a Petition for Rehearing, but that the time for such rehearing without extension by the Court had expired. Prior to the time of Mr. Irwin's advise I was not aware of and had not advised my clients of their right to petition for rehearing.

6. The application for extension of time within which to file a rehearing petition, which this affidavit supports, is not made for the purpose of delay but is presented in good faith in the belief that unless such rehearing is extended a substantial injustice and deprivation of constitutional rights may occur.

/s/ Eugene F. Hayden
Eugene Hayden

Sworn and subscribed to before
me this 31st day of August, 1966

/s/ Rose Stein
Rose Stein
A Notary Public of New Jersey
My Commission expires Oct. 30, 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 268-64

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

MICHAEL KOKIN, GUSTAVE DAVID LANGE, AND EASTERN FIREARMS COMPANY, *Defendants-Appellants*

Affidavit

STATE OF NEW JERSEY
COUNTY OF ESSEX } ss:

CHARLES J. IRWIN, of full age being duly sworn on his oath deposes and says:

1. On August 19, 1966 I was retained by Ernest Hayden, Esq., the attorney for the Defendants-Appellants, in the above captioned criminal matter, to prepare and file a Petition for Writ of Certiorari in the Supreme Court of the United States.

2. In reviewing the briefs, decisions and documents in the case it became apparent that certain vital legal issues had not been presented to the Court for argument or noted by the District Court or Court of Appeals in their respective decisions. Accordingly, I have advised Mr. Hayden to apply for an extension of time within which to petition this Court for a rehearing. This affidavit is submitted in support of that application.

3. The following issues, which among others, appear on the face of the Stipulated Facts, the Indictment and the Opinions of the Courts have apparently not been considered either by the District Court or Court of Appeals.

(a) *Entrapment.*

According to the Stipulated Facts,

(1) Norman R. Conover, a criminal investigator for the Alcohol and Tobacco Tax Division of the Treasury Department, visited Eastern Firearms Company on August 5, 1963, at which time he attempted to purchase an M-1 carbine and the parts necessary to convert same into an M-2 carbine. He was advised that they were not in stock.

(2) On October 17, 1963, Conover again visited Eastern Firearms Company, seeking the M-1 carbine and M-2 parts. At that time he left a deposit for the purchase and requested that he be telephoned when his order was complete. On November 4, 1963 Conover revisited Eastern Firearms Company and purchased the M-1 carbine and the M-2 parts.

(3) On the same day Conover manufactured a machine gun from the M-1 carbine and M-2 parts, but he was unable to make it operate.

(4) On November 5, 1964, Conover returned to Eastern Firearms Company and obtained the assistance of the individual defendants-appellants in putting the M-2 carbine which he had manufactured in functioning order.

The Trial Court made no findings of actual intent to violate the provisions of the statute in question, saying "such intent is neither manifest in the Stipulation or implicit in the single isolated violation at Bar".

The above facts establish the clearest conceivable case of improper entrapment by Federal agents vitiating the alleged crimes. The Supreme Court of the United States, in the case of *Sherman* v. *United States,* 356 U.S. 369 (1958), said:

"The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime."

Entrapment occurs, said Chief Justice Warren, "when the criminal conduct was the creative activity of law enforcement officers."

In the instant case the defendants did not seek out Conover to sell him an illegal weapon—he sought them out and persisted in his objective until he had succeeded in obtaining their assistance in converting the parts innocently (as found by the Court) sold into a weapon for transfer of which a tax should be due. The criminal design originated with the officers of the Alcohol and Tobacco Tax Division of the Treasury and the defendants-appellants were their innocent dupes.

(b) *The Stipulated Facts do not support a finding of guilty on Counts II, IV and VI of the Indictment.*

Count II of the Indictment charges that on November 4, 1963 the defendants "did knowingly and unlawfully transfer a firearm as defined in 26 U.S.C. 5848(2), in violation of 26 U.S.C. 5811(a).

Count IV charges transfer of a firearm on November 4, 1963 in violation of 26 U.S.C. 5814, and Count VI charges unlawfully dealing in firearms on November 4, 1963, without registration, as required by 27 U.S.C. 5802.

The Trial Court, whose opinion was affirmed by this Court, after declaring that a mere sale of an M-1 carbine and the M-2 parts necessary to convert it to an M-2 is not the sale of a firearm under the National Firearms Act, found that with respect to the Conover transaction outlined in (a) above, the interest of the defendants-appellants "terminated only upon operational assembly by and in the presence of the defendants. Only at that point did

Conover obtain what he had bargained for." The interest terminated, therefore, and the sale took place, according to the Court, on November *5, 1964* for, according to the Stipulated Facts, the weapon was not made operational until that date—one day and one year after the parts were sold on November 4, 1963. The Courts decision, therefore, cannot be reconciled with the indictment alleging commission of the crimes on November 4, 1963, which is the date the parts were sold. The defendants cannot be found guilty of a crime for which no opportunity for defense has been afforded, and no indictment filed.

(c) *Failure to consider the effect of 26 U.S.C. 5821.*

Section 5821 of the National Firearms Act provides that:

> "there shall be levied, collected and paid upon the making in the United States of any firearm (either by manufacture, putting together, alteration, any combination thereof, or otherwise), a tax at the rate of $200.00 for each firearm so made."

The National Firearms Act is a taxing statute, *Sonzinsky* v. *United States,* 300 U.S. 506 (1937), and is collaterally designed to establish a Federal register of certain kinds of weapons which are defined to be "firearms". The Defendants-Appellants were indicted, tried and convicted for transferring a firearm without having paid a tax of $200.00 in accordance with 28 U.S.C. 5811(a). If, rather than transferring an operable machine gun, parts for such a weapon are transferred, no tax is due until those parts are assembled into an operable weapon, at which time the Government has an interest in being notified of the existence of the new "firearm" and the tax is due and payable by the person who made the firearm "either by manufacture, putting together, alteration, any combination thereof, or otherwise." The Stipulated Facts in the captioned matter make it clear that the firearm first came into being in Conover's hands and he had a duty to file the requisite

forms and pay the required tax for manufacture on November 4, 1963, when he first attempted to manufacture a machine gun from the material purchased from the defendants-appellants, or at the latest on November 5, 1964, when he finally succeeded in his efforts, with the assistance of the defendants-appellants. The individual defendants may be guilty of assisting him to violate the National Firearms Act in manufacturing the machine gun, but they cannot, as the law is written, be guilty of selling a firearm on November 4, 1963. The "firearm" was manufactured subsequent to that date.

(d) *The Legislative history of the National Firearms Act, as distinguished from the Federal Firearms Act was not considered.*

From the history of the National Firearms Act it is readily apparent that its coverage was intended to differ from the Federal Firearms Act, which deals with pistols, etc. One of the differences is the inclusion in the Federal Firearms Act of an "any part or parts" clause. This construction is buttressed by *U.S.* v. *Tott,* 42 F. Supp, 252, affirmed 3 Circuit 131 F. 2d 261, a case involving the construction of the Federal Firearms Act. The Court there noted that the "earlier National Firearms Act (of 1934) lawfully in *pari materia* was under discussion during the enactment process of the 1938 (Federal Firearms) Act." The 1938 Act originally, like the 1934 Act, contained no "part or parts clause". These words were added to the Federal Firearms Act later by specific amendment. No such amendment was added to the 1934 Act. Evaluation of this legislative history is essential to proper disposition of the instant case.

(e) *Intent.* Each and every count of the Indictment alleges that the acts complained of were knowingly and unlawfully perpetrated. The Opinion of the Trial Court says as a fact that the defendants had no criminal intent. The cases cited in the decision of the trial court relating

to intent turn on other sections of the National Firearms Act. The conviction in the instant case turns on innocent failure to pay a tax. The element of intent should be reconsidered in that light.

7. In view of the existence of all of the foregoing issues and others which apparently were not raised or considered by the Courts, and in view of the fact that counsel for the defendants-appellants was not aware of these issues or of the fact that Petition for Rehearing is permitted by the Rules of this Court, it appears that a substantial injustice will result unless the defendants-appellants are permitted to place these critical issues before the Court for resolution, prior to seeking review by the Supreme Court of the United States.

8. Mr. Justice Byron White has extended the time to petition the Supreme Court of the United States for issuance of a Writ of Certiorari until and including September 27, 1966.

/s/ Charles J. Irwin
Charles J. Irwin

Sworn and subscribed to before
me this 31st day of August, 1966

/s/ Rose Stein
Rose Stein
A Notary Public of New Jersey

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 608

MICHAEL KOKIN, GUSTAVE DAVE LANGE, AND EASTERN FIREARMS COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the United States District Court for the District of New Jersey (Pet. App. 1a–11a) of violations of the National Firearms Act.[1] On February 8, 1966, petitioners each were

[1] Petitioners were convicted of the transfer of a firearm without having paid the transfer tax required by 26 U.S.C. 5811, in violation of 26 U.S.C. 5861; the transfer of a firearm without having procured and forwarded to the Secretary of the Treasury or his delegate the order forms required by 26 U.S.C. 5814, in violation of 26 U.S.C. 5861; and of dealing in firearms without having registered as required by 26 U.S.C. 5802, and without having paid the tax imposed by 26 U.S.C. 5801(a)(2), in violation of 26 U.S.C. 5854 and 5861. Petitioners were acquitted on a related conspiracy count, and on four counts involving a separate transaction.

239-134—66

fined $500. The court of appeals affirmed the conviction on July 29, 1966. 365 F. 2d 595 (C.A. 3) (Pet. App. 12a–13a). Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 27, 1966. The petition for a writ of certiorari, filed on September 29, 1966, is out of time under Rule 22(2) of the Rules of this Court.

There is, in any event, no occasion for further review of petitioners' convictions by this Court, especially since the issues presented in the petition were not properly raised in the courts below.[2]

The relevant facts are stipulated.[3] On August 5, 1963, Agent Conover of the Alcohol and Tobacco Tax Division of the Internal Revenue Service visited the Eastern Firearms Company, of which petitioners Kokin and Lange were officers, in Newark, New Jersey. Conover attempted to purchase from petitioner Lange an M–1 carbine and all the parts necessary to convert the M–1 to an M–2 automatic carbine. Lange advised Conover that he did not have all the necessary M–2 parts available, but that he would have them in about two weeks. Conover returned on October 17, 1963, repeating his request for an M–1 and a complete set of M–2 parts. Petitioner Kokin told the agent that he then had all the M–2 parts, but did not have an M–1 carbine. On November 4, 1963, petitioners

[2] The issues were first raised in a motion to extend the time within which to petition for rehearing in the court of appeals, time having expired. See Pet. App. 13a–14a, 15a–22a. The motion was denied by the court of appeals on September 20, 1966 (Pet. 9).

[3] The stipulated facts are reported in the opinion of the district court (Pet. App. 1a, 2a–7a).

Kokin and Lange sold Conover a complete set of M–2 parts and an M–1 carbine. At the time of this sale, Kokin told the agent that he did not have an M–2 stock, but that the M–1 stock could be altered to fit the M–2. Kokin then attempted to make an alteration on the M–1 stock with a knife, and Lange completed the job with a power grinder. Lange completed re-assembly of the M–1, and Kokin gave Conover an Army Field Manual on the M–2 automatic carbine. On that same day, Conover, in the presence of another Revenue agent, assembled an M–2 automatic carbine using the M–1 carbine and the M–2 parts which he had purchased from Eastern Firearms. The Army Field Manual was used as a guide. When so assembled, the weapon would not function properly because of a bent and worn disconnector lever assembly.

The following day, Conover returned to Eastern Firearms with the completely assembled M–2 carbine separated from the stock. Petitioner Lange replaced the faulty disconnector lever assembly, altered the stock to make it fit, and checked its functioning. Thereafter, on November 8, Conover re-assembled the M–2 automatic carbine as it had been assembled by petitioner Lange. When test fired, the assembled M–2 carbine worked automatically with one pull on the trigger (Pet. App. 3a–7a), *i.e.*, it fired more than one shot by a single functioning of the trigger.

Also stipulated were the facts that an M–2 carbine is a "machine gun" within the meaning of 26 U.S.C. 5848(2); that petitioners were not duly licensed deal-

ers of machine guns within the provisions of 26 U.S.C. 5848(8); that when the transfer to Conover was made, petitioners failed to pay the $200 transfer tax required by 26 U.S.C. 5811 (a) and (b), procure and forward the order form required by 26 U.S.C. 5814, and register pursuant to 26 U.S.C. 5801(a)(2) (Pet. App. 3a–7a).

1. The trial court properly found that the piecemeal transactions of petitioners constituted a transfer of a machine gun in violation of the applicable sections of the Act. As the court stated (Pet. App. 8a–9a):

> In essence, then, Kokin and Lange were presented with a sales proposition consisting of the purchase of an unassembled M–2 carbine rifle. The facts demonstrate an unbroken commercial interest on the part of defendant vendors for some three months in overseeing the actual realization of that weapon. This interest was in no way severed or satisfied on mere transfer of the basic unfitted components to Conover. Rather, it is clear, the interest terminated only upon operational assembly by and in the presence of defendants. Only at this point did Conover obtain what he had bargained for—an M–2 carbine automatic rifle.

Indeed, the district court interpreted the Act rather narrowly, holding as to another transaction by petitioners that the mailing of an M–1 carbine and stock together with M–2 components was not the transfer of a machine gun as defined in 26 U.S.C. 5848(2). See Pet. App. 7a–8a. With respect to the sale to agent Conover, however, the courts below properly

found, in view of petitioners' awareness of the purpose of the transaction and their assembly of the weapon, that petitioners transfered a "machine gun" within the meaning of the Act.

2. Petitioners contend that they were entrapped. Because that issue was raised neither in the trial court nor in the court of appeals, petitioners may not now raise it. *Craig* v. *United States,* 337 F. 2d 28 (C.A. 8), certiorari denied, 380 U.S. 909; *Grant* v. *United States,* 291 F. 2d 746 (C.A. 9), certiorari denied, 368 U.S. 999.

In any event, the stipulated facts do not establish that petitioners were entrapped as a matter of law. It cannot be said that agent Conover implanted in the minds of innocent persons the disposition to commit the offense. See *Sorrells* v. *United States,* 287 U.S. 435, 442. Rather, he merely afforded petitioners the opportunity to commit the crime. That the stipulation reveals that agent Conover was persistent does not establish by any means that petitioners were not otherwise predisposed to commit the offense through selling an automatic weapon to any customer who sought one. Compare *Sherman* v. *United States,* 356 U.S. 369.

3. The indictment charged that the offenses occurred on November 4, 1963. Upon considering the stipulated facts, the trial court determined that the transfer was completed on November 5, 1963, when petitioners assembled the weapon into working condition. The variance of one day between the date alleged in the indictment and that disclosed by the

proof was neither prejudicial to petitioners, nor fatal to the government's case. *Cogdell* v. *United States*, 307 F. 2d 176 (C.A.D.C.), certiorari denied, 371 U.S. 957. In this connection, petitioners assert that the court of appeals radically changed the theory of the case in affirming the convictions, and that therefore the convictions must be reversed under the principles of *Cole* v. *Arkansas*, 333 U.S. 196. The court of appeals phrased the question as whether "in the circumstances of this case" the transfer of the M–1 carbine and the parts necessary to convert it into an automatic rifle constituted a violation of the Act. It held, *per curiam* that "[i]n the circumstances elaborated in the opinion of the district court and for the reasons there stated we are satisfied that, to the extent found by the district court, the appellants have violated the law * * *" (365 F. 2d at 596; Pet. App. 12a–13a). Thus, it is clear that the decision of the court of appeals did not vary from that of the district court.

4. Petitioners also contend that they should not have been found guilty, for they lacked intent to commit a crime. The trial court found that petitioners knowingly transferred a machine gun; no further showing of specific intent to violate the Act is necessary. See, *e.g.*, *Sipes* v. *United States*, 321 F. 2d 174 (C.A. 8); *United States* v. *Decker*, 292 F. 2d 89, 90 (C.A. 6), certiorari denied, 368 U.S. 834; *United States* v. *Wost*, 148 F. Supp. 202, 204 (N.D. Ohio). It is significant in this regard that the penalty provision of the Act, 26 U.S.C. 5861, unlike penalty pro-

visions of other special taxes,[4] does not require a willful violation.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

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[4] See, *e.g.*, 26 U.S.C. 7201, 7202, and 7203.

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